IN THE SUPERIOR COURT

STATE OF ARIZONA

MARICOPA COUNTY

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STATE OF ARIZONA	)	
	)	
Plaintiff,	)	CR 97-05555
	)	
v.	)	SPECIAL VERDICT ON COUNT 1
	)	
SHERMAN LEE RUTLEDGE	)	
	)	
Defendant	)	

I. BACKGROUND.

On September 21, 1999, the defendant, Sherman Lee Rutledge was found guilty by a jury of count 1, murder in the first degree of Ryan C. Harris.[1] The crime occurred on May 13, 1997, is a class 1 felony and was committed in violation of A.R.S. §§ 13-1105, 13-1101, 13-703, 13-704 and 13-812.

On December 1, 2000, April 5 and April 10, 2001 a separate sentencing hearing was held, as is required by A.R.S. § 13-703(B). The court has considered the evidence presented at trial and at the separate sentencing hearing, both the memoranda and oral arguments and the presentence report in making the following aggravation and mitigation findings pursuant to A.R.S. § 13-703(F) and (G). Statements by the surviving family members have been considered only as allowed by § 13-703(D).

II. AGGRAVATING CIRCUMSTANCES

A. The State's Allegations.

The state has alleged the existence of three of the aggravating factors set forth in § 13-703(F). They are:

1. Defendant's contemporaneous convictions in this case on count 2 (armed robbery) and count 4 (attempted second degree murder). The state alleges that these are "serious offenses" for which defendant was "previously convicted" under Arizona law. This allegation of an aggravating factor is made pursuant to § 13-703(F)(2).

[1] Defendant was also convicted of counts 2 (armed robbery) and count 4 (attempted second degree murder).

2. Defendant murdered Ryan Harris "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." Specifically, the state alleges that defendant killed Ryan Harris in order to take the vehicle that Ryan Harris and Chase Clayton possessed at the time of the murder. This allegation of an aggravating factor is made pursuant to § 13-703(F)(5).

3. The murder of Ryan Harris was committed in an especially heinous, cruel or depraved manner. This allegation of an aggravating factor is made pursuant to § 13-703(F)(6).

B. Discussion.

1. § 13-703(F)(2). Pursuant to a motion filed by the state, the court examined and decided this issue last summer. In a minute entry entered on August 17, 2000, the court found that "the (F)(2) aggravating factor is not applicable to this case because counts 2 and 3[2] are crimes that were committed contemporaneously with the murder of Ryan Harris." Minute entry, at 5. The findings and orders of that August 17, 2000 minute entry are affirmed by the court here and are attached to and are expressly incorporated into this special verdict. Accordingly, the court finds that the aggravating circumstance set forth in § 13-703(F)(2) has not been proven beyond a reasonable doubt.

2. § 13-703(F)(5). A court may not find pecuniary gain in every case where a

[2] The minute entry mistakenly referred to the other convictions as counts 2 and 3. They are actually denominated as counts 2 and 4.

person has been killed and at the same time the defendant has benefited financially. *State v. Correll,* 148 Ariz. 468, 715 P.2d 721 (1986). This aggravator exists only "if the expectation of pecuniary gain is a motive, cause, or impetus for the murder and not merely a result of the murder." *State v. Hyde,* 186 Ariz. 252, 280, 921 P.2d 655, 683 (1996). The hope of pecuniary gain must provide the impetus for the murder.

The pecuniary gain finding may be based on tangible evidence or on strong circumstantial inference. In the absence of such evidence or strong inference, "it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain." *State v. Gillies,* 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983). There must be a connection between the motive and the killing. It is not enough that there was an economic motive at some point during the events surrounding a murder. *State v. Medina,* 193 Ariz. 504, 975 P.2d 94 (1999).

Here, no witness testified that defendant killed Ryan Harris and attempted to kill Chase Clayton so that he could steal the Ford Explorer, but the totality of the evidence, circumstantial as it may be, proves beyond a reasonable doubt that pecuniary gain was the motive for these crimes. No other motive was even remotely suggested by the evidence. The somewhat contradictory references to what was expected to occur at the scene of the crime do not support alternative motives but rather bolster the conclusion that Chase Clayton and Ryan Harris were lured to a dark, remote spot so that defendant and his accomplice could take the victims' vehicle at gunpoint.

Other testimony also establishes that stealing the Explorer was the reason for the murder. Kelly Kennedy testified that defendant said that "something is going down."

When defendant first pointed a gun at him, Chase Clayton said "you can have it" or "okay, I'll give it to you" or something similar, indicating that Clayton immediately recognized that a car-jacking was taking place. Jason Ellis (both in his testimony and recorded statement, trial exhibit 107) and Ruben Bustos offered similar testimony. Additionally, both defendant and his accomplice remained in possession of the vehicle into and during the next day in Mesa. And defendant and Jermaine Rutledge acted in concert to attack the two people who possessed the Explorer while not attacking either Jason Ellis or Ruben Bustos, each of whom was a mere occupant, rather than possessor, of the vehicle. Finally, when defendant encountered his victims, he was walking along a canal bank. Having only recently been released from prison, he had no motor vehicle.[3] This aggravating factor has been proven beyond a reasonable doubt.

3. § 13-703(F)(6). In State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), the Supreme Court made plain that this aggravating circumstance must prove that this particular crime is separated from the norm of first degree murders. The aggravating factor of "especially heinous, cruel or depraved" is written in the disjunctive. Only one of the three factors must be proven beyond a reasonable doubt to establish the aggravator. State v. Gretzler, id. The Supreme Court has also held that cruelty refers to the mental and physical suffering of the victim and that heinousness and depravity refer to the "mental state and attitude of the perpetrator as reflected in his words and actions." State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980).

[3] The court notes that defendant has a prior felony conviction for theft of a motor vehicle in CR 90-04528. In the presentence report prepared in that case, defendant said that "he would rather drive a stolen vehicle than walk six miles back to his home…[and] is willing to do the time if he gets caught." Exhibit 8, p. 2.

(a) Facts. Three trial witnesses were present at the scene of the murder of Ryan Harris. All were intoxicated. Their versions vary only in the details, but those details are important for sentencing purposes. Chase Clayton testified that within seconds of arriving at Madison Park, while still in the front driver's seat of the Explorer, he heard Ryan yell "Chase!" and immediately looked at him. Clayton then heard what he first thought was a gunshot and glass shattering. Clayton was struck in the head by a bottle and was attacked by the knife-wielding Jermaine Rutledge. Clayton testified that he got out of the vehicle as did defendant, who then pointed the gun at Clayton's chest from 3 or 4 feet away and pulled the trigger. The gun did not fire, Clayton turned and ran and heard another gunshot. He recalled hearing 2 or 3 gunshots.

Ruben Bustos testified that as soon as they arrived at Madison Park, defendant got out of the Explorer's driver's side rear seat, went around the vehicle to the passenger side, pointed the gun at Ryan and shot him. Ryan grabbed his head and started to crouch down. Defendant then opened the door and threw him out. Immediately Jermaine Rutledge hit Chase Clayton in the head with the beer bottle and defendant opened Chase's door. Chase Clayton then said "if you want it, you can have it." Chase then ran and Bustos heard 3 or 4 more shots.

Jason Ellis' version of what happened was presented at trial through both his trial testimony, which the jury's verdict indicates was largely discounted, and through his videotaped statement of May 30, 1997 to Detective Lewis. (Exhibit 107). This court likewise rejects Ellis' trial testimony to the extent that it exonerates defendant. In his statement to detective Lewis, despite contending that he was "real messed up that

night," Ellis provided much detail. He said that after arriving at Madison Park, Chase Clayton was talking on a cell phone when defendant got out of the vehicle. Defendant took out his gun, pointed it at Chase Clayton and pulled the trigger, but the gun failed to fire. Clayton drove the vehicle forward a little and was struck in the head with a beer bottle by Jermaine Rutledge. Chase then told defendant "you can have it" and ran off. Defendant then shot at Chase Clayton while he ran. Ellis, who was seated behind Ryan Harris, told Ryan to "run, run," but Ryan remained curled up in a ball. Ellis told Ryan to "get out, get out" but he remained curled up in a ball. Ellis recalled seeing Ryan curled up in a ball, but could not remember when he was shot.

Another relevant fact is that neither Clayton nor Ryan Harris were armed or resisted defendant in any way. Also relevant is trial exhibit 109 A, which is a June 4, 1997 letter written by defendant and intended for Jermaine Rutledge. Both were in custody at the Maricopa County Jail on that date. In that letter, written a scant 3 weeks after the murder of Ryan Harris, defendant referred to both Jermaine and himself as "[t]wo notorious as brotha's" and told Jermaine "boy I told ya I'll make ya famous."

(b) Cruel. From these facts, the state alleges that the murder of Ryan Harris was "especially cruel" due to mental anguish suffered by Ryan during the period of time between Chase Clayton being assaulted and then shot and the shooting of a cowering, curled up Ryan. Having considered the conflicting testimony of all three witnesses as set forth in earlier paragraphs, the court finds that Ryan Harris was most probably shot second, as Chase Clayton's testimony implies. However, this finding is not consistent with Ruben Bustos' testimony that defendant exited the vehicle immediately upon arrival

and went to the passenger side and shot Ryan. Ryan, said Bustos, then grabbed his head, couched down into the passenger seat and was eventually dragged out of the seat by defendant. Ryan's failure to respond to Jason Ellis' exhortation to "run" or "get out" of the vehicle may be explained by the fact that he may have already been shot. Indeed, Ellis said that he specifically recalled seeing Ryan curled up in a ball, but could not recall when he was shot. The court also concludes that irrespective of which victim was shot first, the time between the two shootings was very, very short, a matter of seconds.

Due to this conflicting testimony, the court cannot conclude beyond a reasonable doubt that Ryan Harris suffered mental anguish as he contemplated his ultimate fate, as in State v. Jackson, 186 Ariz. 20, 918 P.2d 1038 (1996), or that he heard his companion being shot while knowing that he would be killed next, as in State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) and State v. Ramirez, 178 Ariz. 116, 871 P.2d 237 (1994).

(c) Heinous or depraved. The Supreme Court has set forth five factors which may be considered in determining whether defendant's state of mind was "especially heinous or depraved." State v. Gretzler, id. Among the five are relishing the crime, the senselessness of the crime and the helplessness of the victim.

The state contends that the above-quoted portion of exhibit 109-A proves that defendant relished his murder of Ryan Harris. This court has reviewed each Arizona Supreme Court case which discusses the factor of relishing and has paid special attention to the teachings of State v. Greene, 192 Ariz. 431, 967 P.2d 106 (1998). As here, Greene involved letters written by the defendant, one a month after defendant's

arrest, another two weeks after conviction. The Greene court held that post-murder behavior such as letter writing may be relevant to show defendant's state of mind at the time of the murder and also teaches that the court must not mistake lack of remorse for relishing the killing. Specifically, the Greene court held:

> … The general rule is that a "[d]efendant's state of mind may be inferred from behavior at or near the time of the offense. " [citation omitted]. Post-murder behavior is relevant to prove heinousness or depravity when it provides evidence of "a killer's vile state of mind at the time of the murder…" [citation omitted]. Thus, post-murder statements suggesting indifference, callousness, or a lack of remorse constitute "relishing" only when they indicate, beyond a reasonable doubt, that the killer savored or enjoyed the murder at or near the time of the murder.

Id. at 440-441, 967 P.2d at 115-116.

Trial exhibit 109-A clearly proved that at the time of the writing of the letter, defendant perversely enjoyed the notoriety and was perversely proud of his role in making his little brother "famous". While such evidence without question proves a shocking lack of remorse and callousness and, therefore, that defendant is depraved in the sense that he is morally corrupt, it does not prove depravity at the time of killing. A finding that defendant is depraved is insufficient to prove the F(6) aggravator because the statute plainly requires that the defendant committed the crime in an especially depraved manner, not simply that he be generally depraved.

The evidence here does prove beyond a reasonable doubt both senselessness and helplessness. A long line of cases holds that where the murder is unnecessary to defendant committing an underlying crime, a finding of senselessness will be upheld. Examples are State v. Spencer, 176 Ariz. 36, 859 P.2d 146 (1993); State v. Barreras, 181 Ariz. 515, 892 P.2d 852 (1995); State v. Lee, 189 Ariz. 608, 944 P.2d 1222 (1997);

State v. Shachart, 190 Ariz. 238, 947 P.2d 315 (1997). Neither Ryan Harris' murder nor the attempted murder of Chase Clayton was necessary to steal the Explorer.

The facts also prove that Ryan Harris was helpless at the moment he was killed. Both Clayton and Harris were substantially impaired, neither was armed, they were in a dark park at 2:00 AM or so, were at a complete disadvantage by virtue of being seated in front of and with their backs to the Rutledges and they offered no resistance whatsoever, other than Chase Clayton's attempt to resist Jermaine Rutledge's knife. Conversely, defendant was armed with a gun, Jermaine Rutledge was armed with a knife and beer bottle and defendant and his accomplice caught both Ryan Harris and Chase Clayton completely off-guard, most likely shooting Ryan Harris as he lay curled in a ball.

The state also contends that defendant murdered Ryan Harris and attempted to murder Chase Clayton in order to eliminate them as witnesses to the forcible taking of the vehicle. The court has closely examined the Supreme Court's most important decision on witness elimination as an aggravator, State v. Ross, 180 Ariz. 598, 886 P.2d 1354 (1994). Ross sets forth the findings which the court must make to support the witness elimination factor. The first of these is that the victim witnessed another crime and was killed to prevent testimony about it. Id. at 606, 886 P.2d at 1362. This is the only Ross factor which is arguably applicable here. Clearly, Ryan Harris was a witness to the carjacking and probably witnessed the attempt to kill Chase Clayton. Ross made clear that "[t]oo often, claims of witness elimination are made with no evidence to back them up." Id. As in Ross, there is no proof beyond a reasonable doubt

that Ryan was killed to prevent his testimony. Indeed, the court has already concluded that the evidence proves that his murder was senseless and was committed in the expectation of receipt of pecuniary gain. State v. Barreras, supra, points out the problems encountered when a court finds the witness elimination factor without solid proof. There, Justice Feldman said:

> The trial court also found that the "only apparent reason" defendant killed Kathy was to eliminate her as a witness. Given the paucity of facts to explain defendant's actions or show why he killed, however, one could as easily conclude the killing was senseless because defendant killed for no apparent reason. This, of course, shows the problem with the witness elimination factor. If the evidence shows no reason for a killing, as it very often does, then witness elimination will always be an apparent reason. Thus, as happened here, a trial judge can find aggravation both because the killing was senseless in that the defendant could have accomplished his purpose without killing and also in that he killed for no apparent purpose except to eliminate the victim as a witness. It is difficult to see how both factors logically can exist at the same time. (footnote omitted).

181 Ariz. at 522, 892 P.2d at 858. In a footnote, the court points out that the about-quoted paragraph demonstrates why "we doubt the wisdom of double counting a single aspect of a murder to find an aggravating factor." Id. at 523, 892 P.2d at 859, fn.6. To find both senselessness and witness elimination here would be an unwise exercise in double counting. Moreover, since both the pecuniary gain aggravator and the witness elimination factor demonstrate a "complete lack of understanding of the value of human life," State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986), finding both here presents problems similar to that identified in Barreras.

For the reasons stated above, the court finds that the mental anguish, relishing and witness elimination factors have not been proven beyond a reasonable doubt and that the senselessness and helplessness factors have been proven beyond a reasonable doubt. Arizona law requires that more than helplessness and senselessness be proven in order to establish the existence of the F(6) aggravating factor. State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997). This is so because nearly every first degree murder is senseless and a very great percentage of murder victims are helpless when killed. Since the F(6) aggravator must identify murders which are exceptional, the law requires more. And for the reasons stated, the court is unable to find the mental anguish, relishing and witness elimination factors beyond a reasonable doubt. Accordingly, the court finds that neither the "especially cruel" prong nor the "especially heinous or depraved" prong of the F(6) aggravating factor has been proven beyond a reasonable doubt.

4. Other statutory aggravating circumstances. Section 13-703(D) requires that the court set forth in this special verdict "its finding as to the existence or nonexistence of each of the circumstances" listed in § 13-703(F). Accordingly, the court finds that the aggravating circumstances set forth in §§ 13-703(F)(1),(3),(4),(7),(8),(9) and (10) do not exist.

III. ENMUND/TISON FINDINGS

The indictment charged defendant with first degree murder in the alternative. The state advanced theories that defendant was guilty of both premeditated murder and felony murder. The jury was instructed as to both and was asked to indicate by its

verdict how many of its number found defendant guilty under each of the alternative theories. The jury did so by returning a form of verdict which states that 12 jurors found defendant guilty of felony murder and 11 jurors found defendant guilty of premeditated murder.

The evidence presented at trial proves beyond a reasonable doubt that defendant killed Ryan Harris and that defendant intended to do. Specifically, Ruben Bustos testified that he saw defendant shoot Ryan Harris. Chase Clayton's testimony put the only gun that any witness ever saw that night in the hands of defendant and defendant tried to kill Chase Clayton with that gun. For these reasons, the Enmund/Tison requirements are fully met by the evidence presented.

IV. MITIGATING CIRCUMSTANCES

The record reflects the tortured history of this case as it pertains to the gathering and presentation of mitigating evidence. That history will not be repeated here. Suffice it to say that despite Mr. Rutledge's conduct, mitigation evidence has been presented on his behalf.

A. Defendant's Contentions.

A.R.S. § 13-703(G) sets forth five statutory mitigating circumstances and expressly directs the court to "consider as mitigating circumstances any factors…which are relevant in determining whether to impose a sentence less than death including any aspect of defendant's character, propensities or record and any of the circumstances of the offense." The court's analysis of the mitigating evidence is that defendant alleges the existence of one statutory and three nonstatutory mitigators. They are:

1. Mental impairment, pursuant to § 13-703(G)(1).

2. Prison aggravated defendant's cognitive disorder, a nonstatutory mitigating circumstance.

3. Difficult childhood and family history, a nonstatutory mitigating circumstance.

4. Low intelligence and lack of education, a nonstatutory mitigating circumstance.

B. Discussion.

1. Mental impairment pursuant to § 13-703(G)(1). The Arizona Supreme Court recently addressed the (G)(1) mitigating circumstance, as follows:

> The (G)(1) mitigating factor depends on evidence that "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1). An identifiable mental disease or psychological defect must exist to prove "significant impairment." *See State v. Laird,* 186 Ariz. 203, 208, 920 P.2d 769, 774 (1996); *State v. Apelt (Rudi),* 176 Ariz. 369, 377, 861 P.2d 654, 662 (1993); *Brewer,* 170 Ariz. at 505, 826 P.2d at 802. Character or personality disorders usually are not sufficient to find that a defendant was "significantly impaired." *See State v. Martinez,* 196 Ariz. 451, 999 P.2d 795 (2000); *State v. Murray,* 184 Ariz. 9, 42, 906 P.2d 542, 575 (1995). And, as with other mental disorders, proof of actual causation between the impairment and the criminal act is essential. "[E]vidence of causation is required before mental impairment can be considered a significant mitigating factor." *State v. Stuard,* 176 Ariz. 589, 608 n.12, 863 P.2d 881, 900 n.12 (1993). The court does not equate impulsivity or poor judgment with mental inability to conform one's conduct to the law. *State v. King,* 180 Ariz. 268, 282, 883 P.2d 1024, 1038 (1994).

State v. Hoskins, *339* Ariz. Adv. Rep. 39, 48 (1/11/01).

The defense presented both the expert testimony of Drs. Walter and Jones and documentary evidence in support of the about-quoted Hoskins requirements. Dr. Walter is a nueropsychologist and Dr. Jones a licensed psychologist. The state presented Dr. Blackwood, also a nueropsychologist. Each nueropsychologist offered opinions about defendant's brain dysfunction and Dr. Jones testified concerning defendant's behavioral history. The evaluation by each of these experts was significantly hampered by defendant's willful failure to cooperate with them at various times and in varying degrees.

Dr. Walter testified that based upon testing results, defendant has 90-95% probability of brain damage. This brain damage manifests itself in defendant's low IQ and developmental learning disability.

Dr. Walter also testified that marijuana or alcohol intoxication would exacerbate the effects of defendant's brain impairment, and that defendant's isolation in the department of corrections' special management unit may have made it worse. Substance use would result in defendant being more impulsive, more reactive and have greater impaired judgment.

Dr. Walter opined that defendant's brain damage was "a cause" of his criminal behavior in that impulsivity, irrationality, overreaction and impaired judgment all contribute to the decision to engage in criminal activity. Defendant's brain impairment effected his perception, analysis and reaction. In explaining how defendant's brain damage "caused" this crime, Dr. Walter testified that without it, defendant would have

been more aware of the alternatives available to him and likely would have stolen the Explorer without violence had he not been brain damaged.

Dr. Walter acknowledged that defendant's brain damage does not keep him from knowing right from wrong and that an MRI of defendant's brain revealed a "normal appearing brain." Dr. Walter also acknowledged that defendant suffers from an antisocial personality disorder and that disorder is not necessarily associated with his brain impairment. Lastly, Dr. Walter agreed that defendant's damaged brain did not cause him to steal his victims' vehicle. Significant to this court, Dr. Walter apparently believes that defendant's decision to kill Ryan Harris is itself evidence of defendant's brain damage because, said Dr. Walters, there are "better ways to steal a car." Such an unnecessary murder is the product of defendant's irrationality and impulsivity, says Dr. Walter, even in the face of significant evidence that defendant planned this crime well in advance or that purposeful witness elimination or theft facilitation each provide a rationale for these otherwise senseless shootings.

Dr. Blackwood agrees that defendant has a "bad brain," or more correctly, a "cognitive disorder not otherwise specified." Here, Dr. Blackwood does not disagree with Dr. Walter. According to Dr. Blackwood, defendant's brain functions in the low-average range. Dr. Blackwood opined that there is no link between defendant's below average brain and the murder of Ryan Harris. Dr. Blackwood testified that Mr. Rutledge is simply more inclined to do what he wants to do than to play by the rules and that inclination is not related to his cognitive impairment. Dr. Blackwood agrees that defendant's damaged brain results in defendant's poor impulse control, failure to

recognize or consider consequences, making poor choices and lacking common sense. Dr. Blackwood said that if defendant had a "better brain", he would consider better alternatives.

Dr. Jones testified about defendant's behavioral history, among other things. Dr. Jones testified that records indicate that some of the same "factors" which are "a cause" of Ryan Harris' murder were observed in defendant at age 5, things such as faulty perception, impatience, a low level of tolerance for frustration. Dr. Jones believes that Mr. Rutledge is violent only when he perceives a threat, and that his ability to correctly perceive a threat is impaired. Dr. Jones testified that it is a "possibility" that defendant's decision to kill Ryan Harris was impulsive, although it is equally possible that the event was planned.

It is defendant's burden to prove the existence of mitigating circumstances by a preponderance of the evidence. § 13-703(C). The court finds that the evidence has proven the following relevant facts by a preponderance of the evidence.

1. Defendant suffers from an identifiable mental disease or psychological defect, cognitive disorder not otherwise specified. Defendant also has a developmental learning disability which was aggravated by a degree of hearing loss.

2. Defendant's cognitive disorder manifests itself in his impulsivity, poor judgment and a lack of common sense, that defendant has had such problems from an early age.

3. Defendant also suffers from an anti-social personality disorder which

was first diagnosed by Dr. Bayless in 1987 when defendant was approximately 16 years old.

The Arizona Supreme Court has made plain that impulsivity, poor judgment and the like are not to be equated with an inability to conform one's conduct to the requirements of law. State v. Hoskins, id.; State v. King, 180 Ariz. 268, 883 P.2d 1024 (1994). Additionally, an anti-social personality is not sufficient to support a finding of "significantly impaired". State v. Hoskins, id. Most importantly, while this court does find that defendant has an identifiable cognitive disorder and learning disability, the court does not find it to be a cause of this crime. The court so finds despite Dr. Walter's testimony and does so for the following reasons. Before the court are both Dr. Walter's finding that defendant's cognitive disorder was "a cause" and Dr. Blackwood's finding that it was not a cause. If both expert opinions were fully credited by this court, defendant would fail in his burden. But the court does not fully credit Dr. Walter's testimony. With all due respect to him, the court rejects his causation finding because it cannot credit his testimony on two crucial points: that it is likely that defendant would have stolen the Explorer without violence if he had not been brain damaged and that defendant's decision to shoot Ryan Harris and Chase Clayton is itself evidence of his impulsivity. These conclusions seem grossly illogical and unsupported by evidence.

Because all testifying experts agree with Dr. Bayless' 1987 diagnosis that defendant has an anti-social personality, and because defendant himself recognized in 1990 at age 19 that he has fun when he steals things and that when he wants something, he wants it now (see Exhibit 8, page 2), this court finds that the most likely

psychological explanation for defendant's conduct---if indeed there is one---is that offered by Dr. Blackwood: "he is simply more inclined to do what he wants than to play by the rules." Indeed, defendant's department of corrections disciplinary write-ups and his assignment to and conduct while in the special management units fully support Dr. Blackwood's conclusions.

The court finds that defendant suffers from a cognitive disorder, a developmental learning disability and from an anti-social personality. The court further finds that the cognitive disorder and learning disability have not been proven to be a cause of the murder of Ryan Harris and that neither defendant's "bad brain" nor anti-social personality constitute a "significant impairment" for 13-703(G)(1) purposes. Accordingly, the court finds that the (G)(1) mitigating circumstance has not been proven by a preponderance of the evidence.

2. Prison aggravated defendant's cognitive disorder. Defendant argues that his cognitive disorder was exacerbated by long-term confinement in the special management units at the Florence Eyman facility. Suffice it to say that even if true, the court rejects this evidence as constituting cognizable mitigation. Clearly, defendant's disruptive, nonconforming and violent conduct forced his assignment to the most secure and restrictive environment in this state, SMU #1 and #2 at Eyman in Florence. Once there, defendant continued to disobey rules, even to the extent of fashioning deadly weapons from toothbrushes. As a result, defendant lived in near total isolation from October, 1994 until his release about 4 months before he murdered Ryan Harris.

Even if exacerbation of defendant's cognitive disorder were proven to be a result of defendant's confinement in SMU, this court will not recognize such evidence as mitigating. Indeed, a civilized society cannot recognize as mitigation the fact that a person acts so badly that his just punishment provides an excuse of-sorts for subsequent behavior which is much worse than that which resulted in the punishment at-issue. This cannot and does not constitute mitigation.

3. Deprived childhood and poor family history. The evidence is conflicting as to whether defendant experienced a deprived childhood and poor family history. It appears that his parents were never married, although defendant's parents lived together for 8 years before defendant's birth and remained together until defendant was 11 years old. (See exhibit 8, p. 5 and exhibit 4, p. 6). It is undisputed that his father was convicted of murder and sentenced to prison in approximately 1985. Both parents were high school graduates who were employed. (Exhibit 4). Defendant had violated the law when a juvenile and was referred to Pinal County Juvenile Court. Those records indicate that his mother was present at every or nearly every court proceeding. (See exhibits 2, 3, 5 and 16). Juvenile records reveal that defendant's mother was "somewhat concerned about Sherman and the problems he gets himself into," and that defendant's mother "expected [defendant] to do clean up chores and watch his little brother". (Exhibit 4, pages 6 and 8). Additionally, defendant himself reported that while at age 11 he smoked marijuana with his father,

> …he is very close to his mother whom he describes as being very loving, understanding and supportive. Furthermore, Mr. Rutledge reports he had a very happy childhood, …

Exhibit 16, page 2 of Dr. Bayless' report.

To be sure, the exhibits also reflect defendant's reports that his family engaged in criminal activity, that he associated with adults at a very young age, that he was impressed by their criminal activities and that violence was an ever-present part of his life.

The court concludes that for mitigation purposes, Sherman Rutledge's childhood, whether blissful, chaotic or something in between, is of little consequence for two reasons. First and foremost, defendant was more than 25 years old when he killed Ryan Harris. While a difficult childhood or family history may be particularly relevant for a minor, it is of considerably less relevance to an adult offender. State v. Clabourne, 142 Ariz. 335, 690 P.2d 54 (1984). This is so because adults are held personally responsible for their actions. Moreover, this defendant was provided with juvenile probation services, juvenile correctional services, adult probation services and a lengthy stay in the department of corrections. It is clear that defendant took no demonstrable steps to change. Instead, he murdered within 4 months of being released from prison.

Second, defendant has not proven a nexus between his childhood or family history and this crime. The court has considered Dr. Walter's testimony that a better family life may have helped defendant overcome his cognitive disorder, but the court has previously concluded that defendant's cognitive disorder has not been proven to be a "significant impairment" pursuant to § 13-703(G)(1).

For these reasons, the court finds that the mitigating circumstances of deprived childhood or poor family history do not exist.

4. Low intelligence and lack of education. The evidence suggests that defendant's IQ has been measured at least three times. Dr. Bayless' 1987 evaluation reports a verbal IQ of 79, a performance IQ of 78 and a full scale IQ of 77. Dr. Bayless also noted that defendant's scores "place[ ] him in the borderline range of intellectual functioning" and that "his true IQ most likely is somewhat higher than the tests indicate." (Exhibit 16, Bates page 000875).

Dr. Walter's January 21, 2000 report found defendant of "borderline intelligence" and an IQ of 72. Dr. Jones' February 6, 2001 evaluation "places Mr. Rutledge in the extremely low range of intellectual functioning with a Full Scale IQ score of 64." Dr. Jones also noted that defendant "produced a Verbal IQ score of 63 and a Performance IQ score of 72." These IQ scores are not credible, however, in light of Dr. Jones' statement that the "score produced by Mr. Rutledge should not however, be considered a valid measurement of his intellectual abilities." Dr. Jones nonetheless concludes that "Mr. Rutledge is functioning at an intellectual level that is significantly lower than average intellectual functioning."

The experts' testimony also makes clear that defendant's level of intellect is sufficient to care for himself, hold a job, follow directions, to function in an ordered society and to know right from wrong. While Mr. Rutledge is a high school dropout, he told Dr. Walter that he simply "didn't want to learn."

The court concludes that defendant has proven that he is of borderline intelligence and that he is uneducated. Moreover, the evidence proves that defendant suffers from a learning disability, a manifestation of his cognitive disorder. The court

further finds that defendant is not mentally retarded. No expert testimony nor any test result even suggests retardation. Indeed, this court's interactions with Mr. Rutledge during the pendency of this case leave the court certain that Mr. Rutledge is not mentally retarded. Low intelligence, lack of education and a learning disability, while proven, are not mitigating factors in this case because there is no credible evidence connecting defendant's low level of intelligence, his learning disability or his lack of education to his commission of this crime. State v. Doerr, 193 Ariz. 56, 969 P.2d 1168 (1998). Even if these matters are appropriate as mitigating circumstances, the court finds that they do not constitute mitigation which is sufficiently substantial to call for leniency. State v. Greenway, 170 Ariz. 155, 823 P.2d 22 (1991).

V. CONCLUSIONS

The court concludes that the state has proven beyond a reasonable doubt the existence of one statutory aggravating circumstance: defendant murdered Ryan Harris with the expectation of the receipt of anything of pecuniary value, a Ford Explorer. § 13-703(F)(5). The court concludes that no mitigating circumstances have been proven by a preponderance of the evidence. The court further finds that any mitigating facts which have been proven by a preponderance of the evidence are not sufficiently substantial to call for leniency.

A.R.S. § 13-703(E) requires that if the court finds one or more statutory aggravating factor is proven beyond a reasonable doubt and no mitigation exists or, if proven, is not sufficiently substantial to call for leniency, the court shall impose a sentence of death. Additionally, the Arizona Supreme Court has recognized that "even

where pecuniary gain is the sole aggravating factor supported by the evidence, the death penalty may be warranted." State v. Hoskins, supra at 48.

VI. SENTENCE

Count 1: It is the judgment of the court that the defendant is guilty of murder in the first degree of Ryan Harris, a class 1 felony, in violation of A.R.S. § 13-1105, 13-1101, 13-703, 13-704, 13-801 and 13-812.

It is ordered that the defendant, Sherman Rutledge, be put to death according to the provisions of Arizona law.

In addition, should in the future this sentence of death be set aside by a higher court or commuted by the executive, this court would deem it necessary and proper that defendant be imprisoned in the custody of the state department of corrections for life and that he not be released on any basis for the remainder of his natural life and that such a sentence not be subject to commutation, parole, work furlough or work release, all pursuant to A.R.S. § 13-703(A).

DATED this 12th day of April, 2001

Frank T. Galati
Judge of the Superior Court

FILED: _____

STATE OF ARIZONA

v.

SHERMAN LEE RUTLEDGE (A)

VINCE H IMBORDINO

SHERMAN LEE RUTLEDGE (A)
#A231071
225 WEST MADISON
PHOENIX AZ
85003-0000
MARK W KENNEDY

MINUTE ENTRY

The court has received and read the state's request for a pre-hearing conference. The state's purpose in seeking the requested conference is to obtain in advance of the December 1, 2000 presentence hearing "a definitive ruling" (motion, at 2) concerning the applicability of the aggravating circumstance set forth in A.R.S. §13-703(F)(2).[1]

The state's contention that it is a matter of law whether the 703(F)(2) aggravator applies in this case is correct. The essential facts are indisputable: (1) in addition to its guilty verdict in count 1 (the first degree murder of Ryan Harris), the jury also found defendant guilty of counts 2 and 3, armed robbery and the attempted murder of Chase Clayton; (2) both counts 2 and 3 are "serious offenses" within the meanings of §13-703(F)(2) and §13-703(H); and (3) counts 2 and 3 are "serious crimes committed on the same occasion" (motion, at 2) as count 1, the capital punishment-eligible conviction.

The state recognizes that a footnote in State v. Gretzler, 135 Ariz. 42, 59, 659 P.2d 1, 18 (1983)(fn.2) has been regarded by capital sentencing judges of this court as the Arizona Supreme Court's most authoritative pronouncement on the issue being raised here.[2] The most significant statements by the Gretzler court on the issue presented here are:

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[1] That statutory provision reads as follows: 13-703 F. The court has considered the following aggravating circumstances:

1. . .

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

[2] The Gretzler footnote says:

"F.2. We have held that our death penalty statute is not a recidivist or enhancement statute, the purpose of which is to serve as a warning to convicted criminals and encourage their reformation, rather

> "We have stated that the 'purpose of an aggravation/mitigation hearing is to determine the character and propensities of the defendant.***

(1). The purpose of the aggravating and mitigating factors are to prove defendant's "character and propensities;"

(2). Previous convictions of a serious offense prove character and propensities irrespective of the order in which the underlying crimes occurred or the order in which the convictions were entered.

Other cases make clear that a conviction occurs when the jury reaches its verdict and all that such a "previous conviction" need precede is the §13-703(B) capital sentencing hearing. See, e.g., State v. McKinney, 185 Ariz. 567, 580-581, 917 P.2d 1214, 1227-1228 (1996).

From these principles, the state argues that the simultaneously-entered convictions on counts 2 and 3 are cognizable for (F)(2) purposes because they prove defendant's character and propensities just as they would if committed 3 or 4 hours before[3] or thirteen days before[4] or ten days after[5] or 5 weeks after[6] the murder of Ryan Harris. As the Supreme Court said in State v. Williams, supra:

"That a defendant had been found guilty of other lawless acts of violence is relevant to his character, whether the acts occurred before or after the murder."

183 Ariz. 368, 383, 904 P.2d 437, 452.

Revelation of subsequent lawless acts of violence would help to attain the objectives of the sentencing statute.' *State v. Valencia*, 124 Ariz. 139, 141, 602 P.2d 807, 809 (1979)."

Steelman II, supra, 126 Ariz. at 25, 612, 612 P.2d at 481.

Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan, supra*, 126 Ariz. at 287, 614 P.2d at 829, or the order in which the convictions were entered. *State v. Valencia*, supra, 124 Ariz. at 141, 602 P.2d at 809.

Any language suggesting the contrary in *State v. Ortiz*, supra, 131 Ariz. at 211, 639 P.2d at 1036, is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events. *State v. Gretzler*, 135 Ariz. at 59, 659 P.2d at 18. (Citations omitted).

[3] As in State v. Rogovich, 188 Ariz. 38, 932 P.2d 794 (1994).
[4] As in State v. McKinney, 185 Ariz. 567, 917 P.2d 1214 (1996).
[5] As in State v. Lee, 189 Ariz. 590, 944 P.2d 1204 (1997).
[6] As in State v. Williams, 183 Ariz. 368, 904 P.2d 437 (1995).

This being the case, the state argues that crimes which occurred nearly simultaneously with the murder speak just as effectively about defendant's character as do those which might occur before or after.

Admittedly, the state's argument has much to recommend it and makes good sense. Nonetheless, in attempting to properly apply the Arizona Supreme Court's decisions and the legislature's statutory provisions, this court must reject the state's position for the following reasons.

(1). Despite containing some dicta and appearing solely in a footnote, the previously quoted passage from Gretzler is the Arizona Supreme Court's most definitive pronouncement on this issue and is contrary to the state's position.

(2). Only one statutory aggravator, §13-703(F)(8) clearly addresses contemporaneously committed crimes and that subsection requires the contemporaneously committed crime to be a homicide. See State v. Lacy, 187 Ariz. 340, 353-354, 929 P.2d 1288, 1301-1302 (1996). If the legislature wished the (F)(2) aggravator to apply to "other serious crimes committed during the commission of the offense," it could expressly do so by using the same unequivocal language it adopted in enacting the (F)(8) aggravator.

(3). There is a rational basis for distinguishing between contemporaneously committed serious offenses and those which are temporally separated from the instant crime. A clear purpose of the (F)(2) aggravator is to identify convicted first degree murderers who have a propensity to commit serious offenses. It is rational to measure such a propensity by the number of other times one has engaged in such conduct rather than by the number of discreet serious crimes committed during the defendant's criminal conduct at the time of the subject murder.

(4). A guiding principle of capital jurisprudence is applicable here. It was stated in State v. McKinney, supra:

> "The legislature intended that the aggravating circumstances contained in §13-703 be used to narrow the class of death-eligible defendants. (Citation omitted). Thus, the statutory factors are interpreted and applied in a manner that narrows the class of those who are most deserving of that ultimate sanction."

185 Ariz. at 581, 917 P.2d at 1228. Adopting the state's interpretation of the applicability of §13-703(F)(2) would broaden, not narrow, the class of death eligible defendants. Less than explicit statutory direction by the legislature and imprecise signals from the Supreme Court should not result in expanding the class of death penalty eligible defendants.

For the above-stated reasons, IT IS ORDERED granting the state's request that the court rule in advance of the sentencing proceedings on this issue. This court's ruling is that the (F)(2) aggravating circumstance is not applicable in this case because counts 2 and 3 are crimes that were committed contemporaneously with the murder of Ryan Harris.

*** * * ***

The state's request for a pre-hearing conference expresses a desire that a proceeding be held in court. Upon receipt of the state's request, the court researched the issues raised and because the court concluded that it would not adopt the state's position, this ruling is being issued without awaiting a response from the unrepresented Mr. Rutledge and without setting a hearing. By expeditiously ruling in this fashion, the state is being afforded the earliest opportunity to seek the appellate review which its papers suggest that it will pursue.